Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-739

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare,

Appellant,

—v.—

BETTE P. JABLON and JACOB C. JABLON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 75-791

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare,

Appellant,

—v.—

EDGAR D. COFFIN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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INDEX

PAGE

Opinions Below_____ 2

Statement_____ 2

Questions Presented_____ 3

Argument_____ 4

Conclusion_____ 11

APPENDIX

TABLE OF AUTHORITIES

Cases:

Brandt v. Hickle, 427 F.2d 53, 57 (9th Cir. 1970)_____ 5

Frontiero v. Richardson, 411 U.S. 677 (1973)_____ 5, 11

Reed v. Reed, 404 U.S. 71 (1971)_____ 5

Stanton v. Stanton, 421 U.S. 7 (1975)_____ 5

Weinberger v. Salfi, ___ U.S. ___, 95 S. Ct. 2457 (1975)_____ 9, 10

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)_____ 4, 5, 11, 12

PAGE

Federal Statutes:

42 U.S.C. §402_____2, 3, 10

42 U.S.C. §405_____3, 10

Other Authorities:

Department of Health, Education, and Welfare, Social Security Handbook (4th ed. 1969)_____6, 7, 8

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No. 75-739

F. David Mathews,
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On Appeal from the United States District Court for the District of Maryland

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On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

The opinion of the district court in No. 75-739 is reported at 399 F. Supp. 118 (D. Md. 1975), and is reproduced in the Jurisdictional Statement in No. 75-739 at 1a-33a, and in the Jurisdictional Statement in No. 75-727 at 2a-48a. The opinions and orders in No. 75-791 are reported at 400 F. Supp. 953 (D.D.C. 1975), and are reproduced in the Jurisdictional Statement in No. 75-791 at 1a-16a, and in the Jurisdictional Statement in No. 75-765 at 1a-17a.

STATEMENT

Six appeals arising out of four district court decisions, each decision involving substantially the same constitutional question, have been docketed in this Court. These appeals are: *Mathews* v. *Goldfarb* (E.D. N.Y.), No. 75-699; *Mathews* v. *Silbowitz* (S.D. Fla.), No. 75-712; *Jablon* v. *Secretary of Health, Education, and Welfare*, No. 75-727, and *Mathews* v. *Jablon*, (D. Md.), No. 75-739; *Coffin* v. *Secretary of Health, Education, and Welfare* (D.D.C.), No. 75-765, and *Mathews* v. *Coffin*, No. 75-791. Each of the four district courts held unconstitutional portions of 42 U.S.C. §402 that discriminate explicitly on the basis of gender.[1] Appellant, Secretary of Health, Education, and Welfare, appeals from all four determinations. (Nos. 699, 712, 739, and 791.) In two of these cases, *Jablon* and *Coffin*, appeals have also been docketed by plaintiffs below. (Nos. 727 and 765.)

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[1] *Goldfarb* is reported at 396 F. Supp. 308 (E.D.N.Y. 1975); *Silbowitz*, at 397 F. Supp. 862 (S.D. Fla. 1975).

These appeals challenge the denial of demands by plaintiffs Jablon and Coffin for injunctive relief.[2]

Husband's insurance benefits are at issue in *Silbowitz* and *Jablon*, widower's insurance benefits in *Goldfarb*, both husband's and widower's insurance benefits in *Coffin*.

QUESTIONS PRESENTED

In Nos. 739 (*Jablon*) and 791 (*Coffin*):

Whether 42 U.S.C. §402(b), (c)(1)(C), (e), (f)(1)(D), which authorizes social security benefits for a spouse on a male insured individual's earnings record without regard to dependency, but conditions benefits for the spouse of a female insured individual on proof of dependency, discriminates

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[2] They present the question:

> Whether 42 U.S.C. §405(g) prohibits the federal courts from enjoining the operation of a provision of the Social Security Act held to be unconstitutional.

A similar question has been presented in *Norton* v. *Weinberger*, No. 74-6212. In *Norton*, the focus of the issue is this Court's appellate jurisdiction under 28 U.S.C. §1253. In *Jablon* and *Coffin*, where jurisdiction as to the Secretary's appeals is supplied by 28 U.S.C. §1252, the question relates most importantly to the remedy the district court may grant to prevent unconstitutional action by a federal official.

on the basis of gender in violation of the fifth amendment to the Constitution.[3]

In No. 791 (*Coffin*):

Whether the district court had jurisdiction to determine the entitlement of the spouse of a female insured individual to old-age and survivor benefits, where the spouse filed an application prescribed by the Social Security Administration "for any insurance benefits payable to [him] under the Title II of the Social Security Act" and his multiple requests for a more specific application were denied.

ARGUMENT

I

Jablon and *Coffin*, like *Goldfarb* and *Silbowitz*, present the same gender discrimination-equal protection issue: whether overt, lump gender classification is a permissible means to determine benefits due on the earnings record of an individual insured under social security. Appellees Jablon and Coffin therefore adopt here the arguments set forth in the Motion to Affirm in *Goldfarb*.[4] To summarize:[5]

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[3] The same constitutional question is raised in *Goldfarb*, No. 699, and *Silbowitz*, No. 712, *supra*.

[4] The same attorneys represent Leon Goldfarb, Bette and Jacob Jablon, and Edgar Coffin.

[5] *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, at 654-55 (1975) (Powell, J. concurring opinion).

> The statutory scheme . . . impermissibly discriminates against a female wage earner because it provides her family less protection than it provides the family of a male wage earner, even though the family needs may be identical.

The gender differentiations now in question are not rationally distinguishable from those struck down in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Based on this Court's precedent from *Reed* v. *Reed*, 404 U.S. 71 (1971), through *Stanton* v. *Stanton*, 421 U.S. 7 (1975), the courts below found "inescapable" the conclusion that "the statutory classification at issue here must be invalidated."[6] Plenary review is not warranted in light of the unequivocal instruction this Court has already provided: line drawing by gender is invidious when it devalues the woman's efforts in the economic sector.[7]

II

Far from presenting a "substantial question," the "specific application" issue interjected by the Secretary in No. 791 (*Coffin*) is wholly devoid of merit and "hardly worthy of our great government." See *Brandt* v. *Hickle*, 427 F.2d 53, 57 (9th

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[6] Jurisdictional Statement [hereinafter J.S.] No. 791, at 8a; see J.S. No. 739, at 26a.

[7] *Wiesenfeld*, *supra*, 420 U.S. at 645.

Cir. 1970). For in September 1970, appellee Edgar D. Coffin filed an application prescribed by the Social Security Administration for "all types of social security benefits." That application is appended to the Secretary's Jurisdictional Statement at 23a. It is an application sufficient to "alert the Secretary" (J.S. No. 791 at 6) that the claimant seeks all benefits he may be accorded on the insured's earnings record. The Social Security Administration has so declared. Department of Health, Education, and Welfare, Social Security Handbook §§ 1510, 1511, at 252 (4th ed. 1969).

1. Edgar Coffin sought old-age and survivor benefits as the spouse of an insured wage earner through multiple inquiries and requests in 1970, 1971 and 1972, to federal officials, from Social Security field officers up to the Social Security Commissioner. In response to his inquiries, Edgar Coffin was clearly informed he was ineligible for spousal benefits and could not apply specifically for such benefits. His detailed attestation to this effect, presented to the court below, is set out in the Appendix at 1a-5a.[8]

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[8] Of the six exhibits to the December 8, 1973 Coffin Affidavit, only the last (letter dated May 15, 1972 from Robert M. Ball, then Commissioner of Social Security) has been reproduced in the appendix. The tenor of the other exhibits is indicated in the Affidavit.

At the hearing on the parties' cross motions for summary judgment before the three-judge court, held October 24, 1974, attorney for Edgar Coffin called

2. Edgar Coffin did promptly file the only application ever furnished him prior to judgment in the court below. The form he was furnished, which he filed soon after his wife's death in 1970, contained the recitation, authorized and framed by the Social Security Administration: "I hereby apply for the lump-sum death payment and for any insurance benefits payable to me under Title II of the Social Security Act, as amended." (J.S. No. 791 at 23a.)[9] That application included the inquiry critical to his entitlement to spousal benefits under his wife's account, but wholly irrelevant to his entitlement to the lump-sum death payment:

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the court's attention to the Coffin Affidavit, Coffin's 1970 application for a lump-sum death payment (J.S. No. 791, at 23a), and Coffin's Statement pursuant to Local Rule 1-9(g). Coffin's attorney then pointed out that Edgar Coffin was present in the courtroom and could be examined by the Secretary's attorney should that attorney wish to dispute in any respect the fact contentions sworn to by Edgar D. Coffin. See Transcript, October 24, 1974 hearing. Mr. Coffin was not examined then, nor did the Secretary seek to depose him at any other time.

[9] The basis on which the Secretary now seeks to render "inoperative" the government's representation on an official form (J.S. No. 791, at 6) is not apparent. On another day, his Department informed the American public that the recitation means exactly what it says. See Department of Health, Education, and Welfare, Social Security Handbook §§ 1510, 1511, at 252 (4th Ed. 1969)(set out in the text below at pp. 8-9).

> Question 15: If you are the widower, were you receiving at least one-half of your support from your wife at the time of her death?
>
> Edgar Coffin's Response: No.

(J.S. No. 791, at 24a.)[10]

3. "[F]or the use of people who want a detailed explanation of the Federal retirement, survivors, disability and health insurance programs, so that they may understand how these programs operate," the Department of Health, Education, and Welfare has published a manual, Social Security Handbook (4th ed. 1969)(quotation from Preface at iii). That Handbook states (at 252):

> §1510. EACH APPLICATION FORM CLEARLY SHOWS THE EXTENT TO WHICH IT MAY BE USED AS AN APPLICATION FOR BENEFITS. For example, the present applications for entitlement to hospital insurance protection, for monthly benefits, or for the lump-sum death payment may be applications for all benefits that a claimant may be entitled to on any social security earnings record. (Emphasis supplied.)
>
> §1511 . . . . As §1510 explains, any of these forms can constitute an application

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[10] Since the support test is wholly irrelevant to lump-sum payment entitlement, it is impossible to fathom what purpose Question 15 has other than "to alert the Secretary" (J.S. No. 791, at 6) to qualification of the applicant for spousal insurance benefits.

> for any or all types of social security benefits; but it is preferable to file the specific form designed for claiming the type of benefit meant to be claimed . . . .

Among the forms listed in §1511 as an application "for any and all types of social security benefits" is: "SSA-8 Application for Lump-Sum Death Payment," the very form Mr. Coffin filed. (J.S. No. 791, at 23a.) While Mr. Coffin failed in his efforts to file the "preferable" application, he did file an application the Department of Health, Education, and Welfare itself describes as sufficient to constitute a claim for spousal benefits.

4. In September, 1975, following final judgment in the court below, Edgar Coffin was furnished the "specific applications" earlier denied to him. On September 17, 1975, Mr. Coffin filed an "application for husband's insurance benefits" and an "application for widower's insurance benefits." The Social Security Administration "has processed Mr. Coffin's claim and has certified him for payment." [11]

5. In the court below, the Secretary assessed the relevance of *Weinberger* v. *Salfi*, ___ U.S. ___, 95 S. Ct. 2457 (1975), differently. Although *Salfi* was decided on June 26, 1975, no effort was made by the

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[11] Letter dated November 28, 1975 from William Z. Elliott, Attorney, Department of Health, Education, and Welfare, Office of the Secretary, Baltimore, Md. 21235, to Kathleen Peratis, Director, Women's Rights Project, American Civil Liberties Union.

Secretary to call that decision to the attention of the district court prior to July 14, 1975, the date of the district court's initial Order. Thereafter, on July 24, 1975, the Secretary did rely on *Salfi*, but did not invoke that authority to assert any lack of jurisdiction in the district court under §405(g).[12] On the contrary, the Secretary sought alteration of the judgment "recasting it in terms of 42 U.S.C. §405(g)."[13]

In sum, Edgar Coffin assiduously sought to turn square corners in dealing with his Government and might reasonably expect that his Government would not attempt to run circles around him. Though twice denied

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[12] Section 205(g) of the Social Security Act (J.S. No. 791, at 6) appears in U.S.C. as 42 U.S.C. §405(g).

[13] Not a word in "the Secretary's [July 24, 1975] motion for reconsideration in light of *Weinberger* v. *Salfi*" (J.S. No. 791, at 5) is addressed to Mr. Coffin's "failure to apply specifically" for spousal benefits. Rather, that motion requested the court to withdraw the July 14, 1975 order for injunctive relief and to order only "that the decision of the Secretary not to grant plaintiff husbands [sic] or widowers [sic] benefits pursuant to 42 U.S.C. §§ 402(c) and (f) on the basis of his application for all benefits payable under Title II of the Social Security Act be, and it is, reversed . . . . " Proposed Order accompanying the Secretary's July 24, 1975 motion. The "motion for reconsideration" thus reflected an awareness of the sufficiency of the lump-sum death payment application curiously and conspicuously absent from the Jurisdictional Statement in No. 791.

the vaunted "specific application" at Social Security field offices (see Appendix at 3a-4a), he continued his efforts to claim benefits through recourse to the administrator under the Social Security Act until he was unequivocally informed by the then Commissioner of Social Security himself that "Mr. Coffin is not entitled to widower's benefits." (Appendix at 7a.) Under the circumstances, and in light of 1) the application Edgar Coffin did file in 1970, an application the Department of Health, Education, and Welfare has described to the public as constituting a claim for "any or all types of social security benefits," and 2) the "specific applications" Edgar Coffin has now filed, which the Social Security Administration has processed and certified for payment, the jurisdictional impediment raised by the Secretary is utterly lacking in substantiality.

III

In his Jurisdictional Statements, the Secretary asks this Court to "hold" his appeals in *Jablon* and *Coffin* pending disposition of *Goldfarb* and *Silbowitz*. In the event of plenary review of the constitutional question, coherent, complete adjudication of the matter in controversy would not be served by the Secretary's recommendation. Because both sides have appealed in *Jablon* and *Coffin*, these two cases merit priority attention.

CONCLUSION

The gender lines in these cases, *Frontiero* and *Wiesenfeld* are so "closely

analogous"[14] they cannot be distinguished on any principled basis. Because the Constitution "forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men," *Wiesenfeld*, 420 U.S. at 645, the decisions below should be summarily affirmed to the extent they hold unconstitutional the statutory classification herein. The Secretary's claim of a jurisdictional hindrance in No. 791 should be summarily dismissed, and the appeals in Nos. 727 and 765 should be accorded plenary review.

Respectfully submitted.

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14 The Solicitor General so characterized them in Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld*.